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In the Supreme Court of the United States

OCTOBER TERM, 1978

THOMAS ANDREW GRIFFIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A33) is reported at 589 F. 2d 200.

JURISDICTION

The judgment of the court of appeals was entered on February 6, 1979. The petition for a writ of certiorari was filed on March 8, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether false testimony that hinders a grand jury's investigation may constitute obstruction of justice in violation of 18 U.S.C. 1503.

2. Whether petitioner's false testimony was material to the grand jury's investigation.

STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of obstruction of justice, in violation of 18 U.S.C. 1503. He was sentenced to 18 months' imprisonment, 12 months of which were suspended, to be followed by two years' probation.

1. The evidence at trial showed that in September 1975 an Argentine aircraft bound for Panama crashed at Miami International Airport (Tr. 165-166).[1] Among those killed in the crash was Felix Herrero (Tr. 167). A bank bag containing $15,046 was recovered from the wreckage of the plane (Tr. 167-168).

In October 1975 the FBI began investigating Charles Ebeling and John Cifarelli in connection with loansharking, the financing of loansharking activities, and the transportation of money out of the country (Tr. 102).[2] During this investigation, a number of conversations

[1]"Tr." refers to the one-volume transcript of the trial. References to the transcript of intercepted conversations between petitioner and Ebeling are to the date and time of the separately paginated conversations. "G.J. Tr." refers to the one-volume transcript of petitioner's grand jury testimony.

[2]Prior to petitioner's trial both Ebeling and Cifarelli were convicted of conspiracy to use extortionate means to collect extensions of credit, in violation of 18 U.S.C. 894(a), and obstruction of justice, in violation of 18 U.S.C. 1503. Ebeling was also convicted of collecting an extension of credit by extortionate means, in violation of 18 U.S.C. 894 and 2 (Tr. 121; S.D. Fla. No. 77-201-CR-WMH). Their convictions were affirmed. *United States* v. *Cifarelli*, 589 F. 2d 180 (5th Cir. 1979).

between petitioner and Ebeling were intercepted pursuant to court-authorized wire interceptions. The conversations dealt largely with the efforts of petitioner and Ebeling to recover the money found in the wreckage of the crashed Argentine airplane. In these conversations, petitioner assured Ebeling on various occasions that he was attempting to recover the money found in the crash (1/19/76, 6:29 p.m., at 2-3; 1/19/76, 9:54 p.m., at 3; 1/20/76, 9:31 a.m., at 1-2; 1/21/76, 6:26 p.m., at 3). Petitioner stated that Felix Herrero is "the only man we're worried about" (1/19/76, 6:29 p.m., at 4), that the airplane was ultimately bound for Argentina (*id.* at 6), and that "16,000" was found in a black bag (1/19/76, 9:54 p.m., at 2). Petitioner and Ebeling discussed the statements petitioner should make to federal authorities to obtain return of the money (*id.* at 2-5).

During these conversations, petitioner also discussed a debt that he owed Ebeling (Tr. 119). Ebeling explained that he had to collect money not only from petitioner, but also from three or four other persons (1/25/76, 9:07 a.m., at 3).[3] Among those mentioned during the conversations were "Dominic," "Angelo," and "Jack."[4] Ebeling told petitioner that he had received money from Dominic, but that he had a "legitimate thing" with Angelo (1/26/76, 8:22 p.m., at 3). Petitioner told Ebeling on one occasion that he had talked to Jack, and on other occasions that he was awaiting calls from Jack (1/21/76, 6:26 p.m., at 1; 1/23/76, 6:18 p.m., at 3, 1/25/76, 9:07 a.m., at 10).

[3]Petitioner assured Ebeling that he would obtain money to make a payment on his loan (1/26/76, 3:15 p.m., at 1-2).

[4]None of those individuals was further identified during the recorded conversations or at trial.

2. On March 9, 1976, petitioner was called to appear before a federal grand jury investigating loansharking, the financing of loansharking operations, and the possible movement of money from the United States to South America (Tr. 82). Petitioner testified that he knew Ebeling slightly but that he had no relationship with him (G.J. Tr. 3). Petitioner stated that Ebeling had never discussed the source of money he loaned to petitioner (G. J. Tr. 5-6). Petitioner denied being aware of the crash of an airplane destined to South America and denied discussing that crash with Ebeling (G.J. Tr. 7). He stated that he did not know Felix Herrero, or any one named Dominic, Angelo, or Jack (G.J. Tr. 7, 12-13). Petitioner testified that he was not aware that Ebeling had stated that he had obtained money from Dominic (G.J. Tr. 13-14). He could not recall whether he had talked with Ebeling about any financial arrangements in Argentina (G.J. Tr. 13-14).

3. At trial petitioner testified that his grand jury testimony was true or innocently false (Tr. 235, 237-238). According to petitioner, the subjects of his intercepted conversations with Ebeling were fictitious or otherwise innocuous (Tr. 231-233, 240, 269-273, 315).

ARGUMENT

1. Petitioner contends (Pet. 7-14) that false testimony before a grand jury does not constitute obstruction of justice in violation of 18 U.S.C. 1503. That claim was properly rejected by the court of appeals (Pet. App. A8-A28) in an opinion on which we essentially rely.

a. The crime of obstructing justice is not limited to improper interference with witnesses, jurors, or court officials. 18 U.S.C. 1503 speaks in general and broad terms to prohibit the action of one who "corruptly * * * influences, obstructs, or impedes, or endeavors to

influence, obstruct, or impede, the due administration of justice * * *." As the court of appeals observed (Pet. App. A16), the objective of the statute is to prevent contrived miscarriages of justice. Conduct that results in the submission of false evidence or the withholding of material information may violate the statute if it so impedes the flow of truthful information that "the due administration of justice" is frustrated or impeded. See, *e.g.*, *United States* v. *Walasek*, 527 F. 2d 676, 679-681 (3d Cir. 1975) (destruction of relevant records); *United States* v. *Cohen*, 202 F. Supp. 587 (D. Conn. 1962) (submitting false document to grand jury). Cf. *United States* v. *Vixie*, 532 F. 2d 1277 (9th Cir. 1976) (submission of false documents obstructed administrative proceedings in violation of 18 U.S.C. 1505); *United States* v. *Fruchtman*, 421 F. 2d 1019 (6th Cir.), cert. denied, 400 U.S. 849 (1970) (same); *United States* v. *Tallant*, 407 F. Supp. 878 (N.D. Ga. 1975) (same).

The court of appeals properly concluded (Pet. App. A17-A18) that petitioner's false testimony obstructed and hindered the grand jury's investigation into criminal loansharking and related activities. Petitioner's mendacity impeded the criminal investigation at its earliest stages before the grand jury (Tr. 82-83) and thereby obstructed the due course of the administration of justice. See *United States* v. *Cohn*, 452 F. 2d 881, 883-884 (2d Cir. 1971), cert. denied, 405 U.S. 975 (1972); *United States* v. *Alo*, 439 F. 2d 751, 753-754 (2d Cir.), cert. denied, 404 U.S. 850 (1971).

b. Petitioner contends (Pet. 7) that his conduct before the grand jury was "simple false testimony" and that, although such testimony may constitute perjury under 18 U.S.C. 1621, it is not obstruction of justice within the

scope of 18 U.S.C. 1503.[5] The problem with petitioner's contention is that he was not convicted for "simple false testimony" but for false testimony that obstructed and impeded the due administration of justice.

Petitioner's reliance (Pet. 8) on *United States* v. *Essex*, 407 F. 2d 214 (6th Cir. 1969), is therefore misplaced. In *Essex*, the court of appeals held that a false statement made in an affidavit submitted to the district court was not an obstruction of justice in violation of 18 U.S.C. 1503. Relying on this Court's decision in *In re Michael*, 326 U.S. 224 (1945),[6] the court ruled that "the mere rendering of false testimony," without more, does not obstruct the due administration of justice within the meaning of 18 U.S.C. 1503. 407 F. 2d at 218. The court concluded that, in addition to giving false testimony, the defendant must be shown to have hindered or obstructed

[5]Petitioner notes (Pet. 7) that the perjury statute has a less severe maximum sentence (five years' imprisonment and a $2,000 fine) than the obstruction of justice statute (five years' imprisonment and a $5,000 fine). Petitioner's sentence in this case, however, was within the maximum under either statute. Moreover, petitioner apparently could have been tried under 18 U.S.C. 1623 (false declaractions before a grand jury), which carries the more severe maximum sentence of five years' imprisonment and a $10,000 fine.

Petitioner has not claimed that, *if* his conduct were punishable under 18 U.S.C. 1621, it *could not* be punished under 18 U.S.C. 1503. Cf. *United States* v. *Batchelder*, No. 78-776 (June 4, 1979). Instead, his claim is that his false testimony did not constitute obstruction of justice under 18 U.S.C. 1503.

[6]The Court held in *In re Michael* that false testimony, by itself, does not necessarily constitute contempt of court (326 U.S. at 227):

> All perjured relevant testimony is at war with justice, since it may produce a judgment not resting on the truth. Therefore it cannot be denied that it tends to defeat the sole ultimate objective of a trial. It need not necessarily, however, obstruct or halt the judicial process.

the administration of justice, as by interfering with the jury's investigation. See *ibid.*; see also note 6, *supra*. The indictment in this case, however, alleged precisely that petitioner's false testimony was an "endeavor to obstruct and impede the due administration of justice." (Govt. Ct. App. Br. 20). The evidence at trial showed that petitioner's false testimony hindered the grand jury in its investigation (Tr. 82-83), and the jury was instructed that it must find as essential elements of the offense that petitioner gave false material statements and that in doing so he endeavored to obstruct the due administration of justice (Tr. 355). Since the essential element of obstruction was charged and proved in this case, the decision in *Essex* is not in conflict with the decision of the court below.

c. Petitioner's contention (Pet. 8) that the decision in this case conflicts with *United States* v. *Ryan*, 455 F. 2d 728 (9th Cir. 1971), and *United States* v. *Metcalf*, 435 F. 2d 754 (9th Cir. 1970), also is incorrect.

In *Ryan* the defendant had destroyed certain documents that were sought during the course of investigations by the Internal Revenue Service and a grand jury. The court held that the administration investigation was not a "proceeding" within the coverage of Section 1503 (see 18 U.S.C. 1505) and that the destroyed documents were not material to the grand jury investigation. 455 F. 2d at 733-735. By contrast, the grand jury investigation in this case was unquestionably a "proceeding" under Section 1503[7] and, as we show below (pages 8 to 9), petitioner's false testimony was material to the grand jury's investigation.

In *Metcalf* the court of appeals held that Section 1503 is inapplicable to acts that occurred before judicial

[7]*E.g.*, *United States* v. *Campanale*, 518 F. 2d 352, 365-366 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976).

proceedings have been initiated, as by the filing of a criminal complaint. 435 F. 2d at 757.[8] The court of appeals went on to state, in dictum, that the obstruction of justice offense "would ordinarily seem to be limited to intimidating actions." Even if this dictum were the holding in *Metcalf*, it would not be in conflict with the decision in this case. The suggestion that obstruction of justice "ordinarily" involves intimidation is not in conflict with a conclusion that sometimes it does not. Moreover, in *United States* v. *Vixie, supra*, 532 F. 2d at 1278, the Ninth Circuit necessarily rejected the dictum in *Metcalf* in holding that the submission of a false document to the IRS constituted obstruction of justice under 18 U.S.C. 1505. There is thus no conflict among the courts of appeals warranting further review in this case.

2. Petitioner urges (Pet. 13), without argument, that his false testimony was not material to the grand jury's investigation. The grand jury was investigating loansharking and the secret exportation of money from the United States (Tr. 82). Petitioner's false statements concerned the loansharking activities of Ebeling (who was subsequently indicted by the grand jury) and the attempted removal of more then $15,000 from the United States to South America. These subjects were the proper focus of the grand jury's inquiry, and petitioner's testimony was therefore plainly material to its investigation. See *United States* v. *Whimpy*, 531 F. 2d 768, 770 (5th Cir. 1976); *United States* v. *Parr*, 516 F. 2d 458, 470 (5th Cir. 1975); *United States* v. *Saenz*, 511 F. 2d 766, 768 (5th Cir. 1975); cert. denied, 423 U.S. 946 (1975). Moreover, petitioner's

[8]Here, of course, petitioner's false testimony was given as part of the ongoing grand jury proceeding.

false and misleading testimony hindered the grand jury in performing its lawful duties (Tr. 82-83).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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